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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Warden Associates, Inc.

File: B-291238

Date: December 9, 2002

Harlan Wax for the protester.

Seth Binstock, Esq., Social Security Administration, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency was not required to conduct discussions with protester regarding evaluated weaknesses in its quotation where the quotation was effectively eliminated from consideration as unacceptable and, in any case, agency did not conduct discussions with other vendors.

DECISION

Warden Associates, Inc. protests the award of a blanket purchase agreement (BPA) and task order to Management Analysis, Inc. (MAI) under request for quotations (RFQ) No. SSA-RFQ-02-0202, issued by the Social Security Administration (SSA) for competitive sourcing support services. Warden primarily challenges the agency's failure to conduct discussions with Warden.

We deny the protest.

The RFQ sought quotes from vendors on the General Services Administration Federal Supply Schedule (FSS) for consulting services to provide Office of Management and Budget (OMB) Circular A-76 advisory and support services to the agency's competitive sourcing team and to SSA's individual offices. The successful vendor was to provide all necessary personnel, facilities, equipment, materials, supplies and services to accomplish the functions, tasks, and activities required under the BPA. Vendors were to submit separate quotations for the BPA and the first task order, which were to be evaluated on the basis of four factors, listed in descending order of importance: technical and management approach to BPA and first task order; past performance; staff qualifications; and price. Technical factors were considered of paramount consideration and award was to be based on the

“best value” to the government. Three vendors, including Warden and MAI, submitted quotes by the initial closing time. While the agency evaluated MAI’s and the third vendor’s quotes as technically acceptable, they found Warden’s quote unacceptable due to major weaknesses.

The agency subsequently twice amended the RFQ to add more tasks, increase the performance period of the BPA and the level of effort under the task orders, and modify the evaluation factors. The amended RFQ contemplated the award of a BPA for a period of 36 months, with a cumulative effort on task orders of approximately 60,200 hours. Because of the significant changes to the RFQ, the agency determined to solicit Warden to submit a revised quote, even though its quote had been found unacceptable. All three vendors submitted revised quotes and the agency conducted a new evaluation. Again, the evaluators found MAI’s and the third vendor’s quotes technically acceptable, but found Warden’s to contain so many weaknesses that it could not be accepted for award. Based on MAI’s lower overall prices, the agency determined that its quote represented the best value; it thus awarded MAI the BPA and first task order. After receiving notice of the agency’s action, Warden filed this protest.

Warden raises a number of issues regarding the evaluation and the agency’s failure to engage in meaningful discussions with it. In reviewing a protest against a procuring agency’s evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. National Toxicology Labs., Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ¶ 5 at 3. We have reviewed all of Warden’s arguments and find that none has merit. We address Warden’s most central arguments below.

Warden asserts that its quote was included in the competitive range—as evidenced by its receipt of the two RFQ amendments—and that it therefore was entitled to meaningful discussions before submitting its revised quote. Federal Acquisition Regulation (FAR) § 15.306(c).¹

¹ As a preliminary matter, Warden relies on various provisions of FAR part 15 that govern contracting by negotiation. The agency asserts that, since this procurement concerns an FSS purchase, it was governed by FAR subpart 8.4, not part 15. See Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4. Where, as here, an agency uses vendors’ responses as the basis for a detailed technical evaluation and price/technical tradeoff, we will review the agency’s actions under the standards applicable to negotiated procurements—even though the procurement may not be directly governed by FAR part 15—to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Digital Sys. Group, Inc., B-286931, B 286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5.

Warden's assertions are without merit and are based on a misunderstanding of the circumstances of this procurement. Contrary to Warden's expressed understanding, its quote was not included in a "competitive range" either before or after the amendments were issued. Rather, as discussed above, both its initial and revised quotes were evaluated as unacceptable. Agency Report (AR), exh. 12, at 3, 5. Where a quote is eliminated from the competition as unacceptable, the vendor is not entitled to discussions. See Drytech, Inc., B-246276.2, Apr. 28, 1992, 92-1 CPD ¶ 398 at 7-8.² The agency provided the amendments to Warden despite the unacceptability of its original quote only after determining that the amendments made significant revisions to the RFQ; the agency concluded that Warden should be given the opportunity to respond to the agency's actual requirements.³ Providing this opportunity did not reverse the prior evaluation and place Warden's unacceptable proposal in a competitive range for discussion purposes; rather, it merely returned the procurement to the quotation submission/evaluation stage. Accordingly, Warden was not entitled to discussions based on the agency's actions.⁴

In any case, the RFQ specifically provided that the agency intended to award the BPA and task order without conducting discussions (RFQ ¶ XV), and this is what the agency did. Although the record shows that the agency did communicate with MAI and the other vendor regarding their original and revised quotes, the agency characterizes these questions as clarifications and not discussions. In this regard, clarifications (FAR § 15.306(a)) are limited exchanges between the government and an offeror and are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal to make it acceptable. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. On the other hand, discussions or "negotiations" (FAR § 15.306(d)) are "exchanges . . . between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal." MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17 at 9. Because both vendors' quotes were evaluated as excellent

² We note that, just as Warden did not challenge the validity of the identified weaknesses themselves, it does not explain how discussions would have allowed it to prepare an acceptable quote.

³ Warden asserts that the agency should have issued its revisions as a new solicitation and provided it with a debriefing on its unacceptable initial quote. If Warden believed that the revisions were so significant that a separate solicitation was required, it should have protested such an impropriety prior to closing time for revised quotes. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2002). Any protest on this basis now is untimely.

⁴ Warden seems to assert that, because the amendments revised the requirements, it was entitled to discussions before submitting its revised quote in any event. However, the issuance of amendments does not obligate an agency to conduct discussions.

to outstanding, there is no basis to infer that the exchanges were anything more than clarifications. The only time the vendors were permitted to submit significantly revised quotations was in response to the amended RFQ, the same opportunity provided Warden.

As for the evaluation of Warden's revised quote, the agency identified numerous weaknesses. For example, the evaluators found that its technical and management approach for the BPA was not well-organized; its quote for the first task order failed to address the full range of RFQ tasks and appeared to propose too many hours for the principal labor category; its past performance record indicated that much of its experience covered only part of the competitive sourcing process or was gained as a subcontractor for a larger company; and its key personnel, while qualified, did not appear sufficient in number to accomplish the multiple concurrent task orders envisioned by the BPA. AR, exh. 8, at 4-5. Based on these and other weaknesses, the evaluators concluded that the "combination of a proposal that did not adequately address the requirements in the BPA or the task order statement of work and the potential for inadequate staffing make this proposal unacceptable." *Id.* at 5. Warden has not rebutted the agency's findings or otherwise shown that the agency's conclusions were unreasonable. Accordingly, we have no basis to question the reasonableness of the agency's evaluation of the protester's quote as technically unacceptable.

The protest is denied.

Anthony H. Gamboa
General Counsel